UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: DAVOL, INC./C.R. BARD, INC., POLYPROPYLENE HERNIA MESH PRODUCTS LIABILITY LITIGATION

Case No. 2:18-md-2846

JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Kimberly A. Jolson

This document relates to:
Johns v. CR Bard et al.,
Case No. 2:18-cv-1509

OPINION AND ORDER

On July 7, 2021, Plaintiff filed his Motion for Partial Reconsideration and/or Motion for Clarification of Motion in Limine Opinion and Order No. 12. (ECF No. 469). Plaintiff raises two grounds for reconsideration or clarification of the Court's opinion and order, which addressed Defendants' Motion in Limine No. 15.[1] First, Plaintiff argues that new evidence has emerged demonstrating that Sepramesh and Sepramesh IP are, for the purposes of this case, essentially the same product. (*Id.* at PageID #24293.) Second, he contends that Defendants' motive is at issue because punitive damages are at issue, and evidence of Defendants molding the hernia mesh market for other devices goes to recklessness or malice under punitive damages. (*Id.* at PageID #24298.) For the reasons that follow, the motion is **GRANTED IN PART AND DENIED IN PART**.

[1] Motion in Limine Opinion and Order No. 12 contains a complete procedural history of the adjudication of Defendants' Motion in Limine No. 15. *In re Davol, Inc./C.R. Bard, Inc. Polypropylene Hernia Mesh Prods. Liab. Litig.*, Nos. 2:18-md-2846, 2:18-cv-1509, 2021 WL 2643107, at *1 (S.D. Ohio June 28, 2021).

As an initial matter, motions in limine are provisional and can be revisited. *Hawn v. Speedway LLC*, No. 1:16-CV-359, 2018 WL 2192162, at *2 n.1 (N.D. Ind. May 14, 2018). Thus, neither the parties nor the Court need address the framework for motions for reconsideration.

First, Plaintiff argues that new evidence was elicited during Stephen Eldridge's deposition that warrants reconsideration of the Court's conclusion that Sepramesh is irrelevant to Defendants' notice of a resorption period that was shorter than advertised because, unlike Sepramesh IP, it is not a predicate device to the Ventralight ST. (ECF No. 469 at PageID #24293–96.) The crucial question for notice is how similar the other devices are to the Ventralight ST in the relevant respect, such that Defendants would have or should have been aware of certain issues—here, the resorption period of the ST layer. *In re Davol, Inc./ C.R. Bard, Inc., Polypropylene Hernia Mesh Prods. Liab. Litig.*, 499 F. Supp. 3d 505, 515–18 (S.D. Ohio 2020) (holding FDA-related and audit evidence about the Composix Kugel is relevant to notice of shortcomings in the same mechanisms for quality control, product specification, etc. for the Ventralight ST); *In re Davol, Inc./ C.R. Bard, Inc., Polypropylene Hernia Mesh Prods. Liab. Litig.*, --- F. Supp. 3d ----, Nos. 2:18-md-2846, 2:18-cv-1509, 2021 WL 486425, at *9–11 (S.D. Ohio Feb. 10, 2021) (holding that evidence of the transvaginal pelvic mesh litigation is relevant to Defendants' notice of the risks presented by polypropylene because the devices were both made of Marlex polypropylene and degraded oxidatively). At the time, Plaintiff produced had no evidence of the similarities between Sepramesh and Sepramesh IP or Sepramesh and the Ventralight ST. Now, Plaintiff has.

Plaintiff's counsel asked Eldridge, "So what specifically changed [between the Sepramesh and Sepramesh IP]? Specifically focusing on the hydrogel resorption, what data have you seen . . . that shows that there was any change between the hydrogel resorption time window between the

first iteration of Sepramesh and the Sepramesh IP . . . ?" (ECF No. 469-1 at PageID #24308–09.) Eldridge responded that

> the problem with the product[, the Sepramesh,] was it would come off, it would delaminate, and my recollection is there wasn't really a problem with, you know, resorption. And so when they went to the IP product, they added another material called polyethylene glycol . . . that, in conjunction with some other materials that are in there, cross-link with the PGA fibers that are knitted into the mesh, it held the coating on the mesh, it didn't delaminate. But as far as I know, there were really no differences in resorption between them.

(*Id.* at PageID #24309–10 (cleaned up).) Counsel then confirmed, "what you're saying is that the issue really pertained to the delamination, that is, the actual barrier coming off the mesh, rather than how long does it take the body to resorb the hydrogel that's on the mesh, is that fair?" (*Id.* at PageID #24310.) Eldridge responded, "Correct." (*Id.*) Counsel went on, "And then based on your work specifically on Project Zebra, you came to learn there was no difference in the resorption window between either Sepramesh or Sepramesh IP, is that right?" (*Id.*) Eldridge confirmed: "That's what I remember, yes." (*Id.*) This is enough to show that a fact question exists as to whether Sepramesh and Sepramesh IP have the same or similar resorption window. And because Sepramesh IP is a predicate device to the Ventralight ST, evidence of what Defendants knew about the Sepramesh resorption window is now relevant.

It bears noting that Plaintiff presented four documents that pertained to Sepramesh in this portion of the Court's opinion, and that three of those four exhibits did not pertain to the resorption period of any barrier. (ECF No. 455 at PageID #23371 (noting exhibits ECF Nos. 368-12, -13, -14, and -16).) Thus, the only exhibit directly discussed in the Court's previous opinion that would be impacted by this change is ECF No. 368-16.

Defendants raise several unconvincing counterarguments. First, they contend that Plaintiff should not have inquired about the differences between Sepramesh and Sepramesh IP after the

Court issued its ruling in Motion in Limine Opinion and Order No. 12. (ECF No. 471 at PageID #24350.) Discoverability is a different issue than admissibility, however. Discovery is governed by Federal Rule of Civil Procedure 26(b)(1), which provides that "the scope of discovery" includes "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Plaintiffs were permitted to examine Eldridge on this issue.

Second, Defendants argue that the Court's opinion about the relevance of these documents was limited to whether the device was a predicate to the Ventralight ST. (ECF No. 471 at PageID #24351.) The Court's holding was not intended to limit evidence of notice to whether a device was a predicate to the Ventralight ST, however. The issue is whether previous devices or components of devices are similar enough to be probative of notice of specific risks. *E.g.*, *In re Davol, Inc./C.R. Bard, Inc.*, 2021 WL 486425, at *9 (noting that similarities between devices must be "similar enough to be relevant to Defendants' notice").

Third, Defendants attack Plaintiff's recounting of Eldridge's deposition testimony, arguing that the testimony does not ultimately show that Sepramesh and Sepramesh IP are similar or identical. Eldridge later appeared to recant his statements described *supra*, explaining that his "recollection was not quite correct." (*Id.*) This only demonstrates an issue of fact for the jury, however. This Court cannot weigh Eldridge's credibility. Defendants also assert that Plaintiff conflates protection of the viscera from bare polypropylene with the resorption window, and that the resorption window does not demonstrate that Sepramesh and Sepramesh IP have the same resorption profile. (*Id.* at 24353.) This is again an issue of fact. Plaintiff has shown that this testimony is relevant to whether Defendants had notice of a too-short resorption window for the Ventralight ST, which led to the exposure of bare polypropylene to Plaintiff's viscera, causing adhesions. Defendants also argue that various exhibits shown to Eldridge do not address the

resorption profiles. (*Id.* at 24353–54.) Defendants may certainly point to this testimony at trial, but again, Plaintiff has pointed to relevant evidence. Now the jury must weigh the different parts of Eldridge's testimony and determine what it means.

Second, Plaintiff argues that the Court should amend what he construes as a holding that motive is generally not at issue in this case. (ECF No. 469 at PageID #24296–99.) The Court did not hold that Defendants' motives related to their marketing of Ventralight ST are not at issue; it held that evidence of Defendants' motives behind their alleged "molding the market" with other devices was not at issue. (ECF No. 455 at PageID #23367.) This determination was made within the context of Plaintiff's Federal Rule of Evidence 404(b)(2) argument that evidence of Defendants' motives while molding the market with via non-Ventralight-ST devices. (*Id.*) Rule 404(b) pertains to "other crimes, wrongs, or acts" that are separate from the acts that form the basis of this case, *i.e.* Defendants' actions with regard to the Ventralight ST. Fed. R. Evid. 404(b). Thus, the Court's holding made in the context of Rule 404(b) has no impact on evidence that pertains to Defendants' actions, motivation, knowledge, etc. in relation to the Ventralight ST.

Accordingly, Plaintiff's Motion for Partial Reconsideration and/or for Clarification of Motion in Limine Opinion and Order No. 12 (ECF No. 469) is **GRANTED IN PART AND DENIED IN PART**.

IT IS SO ORDERED.

7/20/2021
DATE

s/ Edmund A Sargus, Jr.
EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE